Internal Revenue Service

memorandum

TL-N-5240-91
ORPirfo

date: JUN 13 1991

to: District Counsel, Chicago CC:CHI
Attention: Teri A. Frank

from: Senior Technician Reviewer, Branch No. 2,
Tax Litigation Division CC:TL:Br2

subject: [redacted] Statute Extensions

This is a further response to your request for advice, dated January 28, 1991, and supplements our earlier memorandum, dated March 13, 1991, on how best to protect the statute of limitations for assessment of the subject taxpayer and its relevant transferees and/or successors. We also address herein your supplemental request of March 25, 1991, regarding extensions obtained from [redacted], a [redacted] acquisition by [redacted], with respect to [redacted]'s [redacted] and [redacted] taxable years.

While your original request was directed to all the [redacted] taxable years [redacted] through [redacted], our March 13, 1991 advice only addressed the [redacted], [redacted] and [redacted] taxable years because of the differing time constraints cited in your request and because the various years at issue were more easily discussed in discrete groupings. Thus, the issues surrounding the remaining taxable years are considered herein.

ISSUE

In order best to protect the Government's interest, which is the proper corporation to execute any consents extending the statute of limitations on assessment (including transferee liability) for various years in the case of the income tax liability of a consolidated group of corporations restructured as described below.

FACTS

The material facts are set forth in your aforementioned request of January 28, 1991, the attachments thereto, and were supplemented in subsequent telephone conversations and meetings between Teri A. Frank of your office and Russ Pirfo of this office. These facts were summarized as follows:

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[redacted] (EIN [redacted])[1] [redacted] filed consolidated returns for the taxable years [redacted], [redacted], and [redacted]. [redacted], the common parent of the group, was incorporated under the laws of Delaware.

[redacted] (EIN [redacted]), also a Delaware corporation, was formed on [redacted]. [redacted], another Delaware corporation, was organized as a wholly-owned subsidiary of [redacted].

On [redacted], pursuant to Delaware law, [redacted] merged with and into [redacted] (formerly [redacted]), with [redacted] terminating and [redacted] surviving the merger. As a result of this, [redacted] became a wholly-owned (direct or indirect) subsidiary of [redacted]. This acquisition of [redacted] by [redacted] was a "reverse acquisition" under Treas. Reg. § 1.1502-75(d)(3).[2]

Following the merger, [redacted]% of the common stock of [redacted] was held directly by [redacted] and the remaining [redacted]% was held by [redacted] first and second tier subsidiaries of [redacted].

On [redacted], [redacted] adopted a plan of complete liquidation pursuant to section 332. Between that time and [redacted], [redacted] distributed assets consisting of the common stock in its various operating subsidiaries to those fifty [redacted] subsidiaries in redemption of their stock in [redacted]. Each of these corporate [redacted] shareholders executed an agreement whereby each corporate shareholder assumed certain liabilities and obligations of the [redacted] operating subsidiaries. The liabilities and obligations assumed by these shareholder corporations were limited to those arising from the operations of the respective operating subsidiaries whose stock each had received in the liquidation.

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[1] This corporation changed its name to [redacted] in [redacted].

[2] This factual conclusion is based upon the statements of the taxpayer contained in the attachments to your request and the information you submitted to us regarding fair market values for the outstanding stock of [redacted], common and preferred, that were involved in the transaction. On the basis of your figures, the former [redacted] shareholders would have received well over fifty percent of the fair market value of the outstanding stock of [redacted]. Hence, a reverse acquisition under the regulations had occurred.

On [redacted], [redacted] (EIN [redacted]) made a final distribution of assets to [redacted] (EIN [redacted]), which by that time was now [redacted]'s sole shareholder. [redacted] made a general assumption of all the liabilities and obligations of [redacted], including federal income tax liability. At that time, [redacted] also changed its name to [redacted].

On [redacted], "old" [redacted] (EIN [redacted]) (the former [redacted]) filed a certificate of dissolution with the Delaware Secretary of State.

On [redacted], [redacted] (formerly [redacted]) was merged with and into [redacted] (a wholly-owned subsidiary of [redacted]) with [redacted] going out of existence and [redacted] left as the surviving corporation of that merger. [redacted] then adopted the name of [redacted] as well.

A number of transferee agreements as well as certain consent forms purporting to extend the statute of limitations for the assessment of transferee liability have been executed. These consents are recounted in your memorandum and we will discuss each, and its effect, as appropriate below.

DISCUSSION

Taxable Years: [redacted] and [redacted]

The common parent agent filing the income tax return for these consolidated years was the "old" [redacted] (EIN: [redacted]; which subsequently changed its name to [redacted]). The original three-year period for assessment on these taxable years expired in [redacted] and [redacted], respectively. *See* I.R.C. § 6501(a). Pursuant to certain District Counsel advice, there were never any Forms 872 secured to extend the "primary" liability of the taxpayer or any of its subsidiaries for these taxable years. Securing Form 872 consents now would have no effect since the required unbroken "chain" of extensions to the original period for assessment would not exist. *See* I.R.C. § 6501(c)(4). Given this, the issues dealt with in our earlier advice regarding which corporation was the common parent or the nature of the several liability of the subsidiary corporations are immaterial with respect to the [redacted] and [redacted] years of [redacted].

Notwithstanding the absence of any Forms 872, there were Form 2045 transferee agreements and Form 977 transferee statute extension consents executed in [redacted] by [redacted] (the former [redacted], EIN [redacted]) with regard to these two years. The Form 977 extends the period for assessing transferee liability against the former [redacted] with respect to the [redacted] and [redacted] tax years of the "old" [redacted] group until [redacted]. Since the original three-year assessment limitation period against the taxpayer (the transferor) was never extended, reliance upon the transferee liability and an extended limitation period for assessment thereof is the only route now open.

As was the case with the earlier years discussed in our prior advice, when the former [redacted] went out of existence by way of its merger into [redacted] on [redacted], [redacted] undertook the obligations and liabilities of [redacted] (EIN [redacted]) as its successor corporation by operation of Delaware law. Del. Gen. Corp. Law § 259. Among these obligations was the liability that the former [redacted] had as a transferee of the dissolved [redacted]. An obligation that had been duly and properly extended until [redacted]. Since [redacted] is the corporate successor to [redacted], it stepped into the position of [redacted] with regard to this transferee liability. Therefore, [redacted] is liable as an initial transferee -- not just as a transferee of a transferee -- to the same extent that [redacted] was so liable.

The agreement of the parties (Attachment 8, section 1.4, to your request) simply spells out expressly the same legal consequences and serves to reinforce [redacted]'s obligation for the transferee liability of [redacted]. As a result, [redacted] (now named [redacted]) may itself execute Forms 977 further extending the limitation period for assessment as an initial transferee of the dissolved [redacted] (EIN [redacted]) in the same way that [redacted] would have been able to extend the time for an assessment of any tax for which it was liable.

Again, as we recommended with respect to the [redacted] through [redacted] years, a Form 2045 transferee agreement should be secured from [redacted] (now named [redacted]) acknowledging its successor role to [redacted] but also specifically reciting its initial transferee status in relation to [redacted] (EIN [redacted]) by virtue of that successorship for the [redacted] and [redacted] tax years. The language of that transferee agreement should track the wording which we worked with you and Appeals for the earlier years.[3]

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[3] With respect to the [redacted] subsidiaries that were also transferees of the [redacted] assets by way of their agreements with the [redacted] operating subsidiaries, see Facts, *supra* at 2, the period of limitations on assessment of transferee liability as to these subsidiaries expired as of late [redacted] and [redacted] for the [redacted] and [redacted] taxable years, respectively.

To the extent needed, as your memorandum suggests, Form 977 consents should continue to be secured from [redacted] in its capacity as an initial transferee.

Note also that we would take the position that not only is [redacted] liable as an initial transferee by virtue of being [redacted] successor, but, theoretically, it could be liable as well as a transferee of a transferee. In brief, unlike the way your advice request could be read to suggest, [redacted]'s status is not necessarily an "either or" situation. Our position is based upon a view stated in one of the Southern Pacific opinions wherein the Tax Court held that the taxpayer, even though primarily liable by operation of law as a successor, could also be liable as a transferee since it had received the assets of the terminating corporation and agreed with the transferor corporation to assume the latter's liabilities. 84 T.C. 387, 393-95 (1985). The petitioner in that case had argued that, since it had simply stepped into the shoes of the predecessor corporation by operation of law, there had been no "transfer" upon which to predicate transferee liability. The court rejected that argument and the application of that court's rationale to the instant case works to support both transferee of a transferee status as well as initial transferee status for [redacted].

This "additional" liability of [redacted] as a transferee of a transferee will expire at the end of [redacted] years from the expiration of the original transferor's ([redacted]) period of limitation on assessment. I.R.C. § 6901(c)(2). That will be in [redacted] and [redacted], respectively, unless extended. Any extension by the "initial" transferee (which in this case is one and the same as the transferee of the transferee, [redacted]) would have no effect on this time limit. We believe that initial transferee liability of [redacted] is strongly established here; hence, we need not pursue a discussion of the less adequate and theoretical protection afforded the Government by establishing transferee of a transferee status in [redacted]. We would suggest, nevertheless, that you also consider securing extensions from [redacted] in its specific capacity as a transferee of a transferee as well.

Considering the liability of a transferee of a transferee brings up the [redacted]/G.C.M 34599 problem of whether a jeopardy assessment against [redacted] ("new" [redacted]) might be appropriate. As your memorandum points out, Columbia Pictures Industries, Inc. v. Commissioner, 55 T.C. 649 (1971), acq., 1971-1 C.B. 2, holds that any liability of a transferee of a transferee terminates three years from the expiration of the period of limitation for assessment against the original transferor[4] and that this limitation period is unaffected by any extension consent executed by the initial transferee. This is of concern in our case since the initial transferee here, "new" [redacted] ([redacted]), could transfer its assets to another corporation shortly after the three-year "absolute" limitation period has expired (in [redacted] of [redacted] and [redacted], respectively) and we would be left with a "new" [redacted] ([redacted]) having no assets available with which to satisfy an assessment and no other party that could be reached under the period of limitations as established by [redacted]. Given such a situation, in G.C.M. 34599, at pp. 9-10, it is suggested that an alternative available to the Service might be to make a jeopardy assessment against the initial transferee corporation.

We have coordinated this question with Branch No. 3, Tax Litigation (Contact: W.E. McLeod, FTS 566-3407). Branch 3 has referred the matter to the General Litigation Division and will advise when an answer has been received. Pending General Litigation's response, the tentative conclusions of Branch 3 are as follows:

Given the conventional manner in which jeopardy assessments are used, it is not clear whether it would be appropriate to make a jeopardy assessment in this case. Generally, jeopardy assessments are not used because the statute of limitations may expire, which is how a jeopardy assessment would be used in this case. Treas. Reg. § 301.6861-1(a) provides that the district director will make a jeopardy assessment if at least one of three conditions described in the termination assessment regulations, Treas. Reg. § 1.6851-1(a)(1), exists. These conditions are:

(i) The taxpayer is or appears to be designing quickly to depart from the United States or to conceal himself or herself.

(ii) The taxpayer is or appears to be designing quickly to place his, her, or its property beyond the reach of the Government either by removing it from the United States, by concealing it, by dissipating it, or by transferring it to other persons.

(iii) The taxpayer's financial solvency is or appears to be imperiled.

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[4] This period could be extended only if the transferee of a transferee and the Service execute an extension consent before the lapse of three years from the expiration of the original transferor's assessment limitation period.

None of these conditions appears to exist in this case. Under the rationale of [redacted], however, the Service would be placed in a jeopardy situation unless the Service takes some action to protect collection activity prior to the expiration of the three year statute of limitations for the transferee of a transferee. Without an assessment prior to the expiration of the statute of limitations on assessment for a transferee of a transferee, the initial transferee could subsequently transfer assets and become insolvent, and the Service would be unable to collect from the initial transferor, the insolvent initial transferee or the transferee of a transferee.

We do not know how successful we will be in maintaining a jeopardy assessment based on these circumstances. Even though there is reason to believe that under the circumstances, the assessment or collection of the liability will be jeopardized by delay as required under I.R.C. § 6861, these circumstances are not addressed in the regulations. We will advise you of the General Litigation Division's response as soon as we can.

Taxable Year: [redacted]

Pursuant to Treas. Reg. § 1.332-4(a)(2), [redacted] (EIN [redacted], under its new name of [redacted]) as the recipient corporation, filed a duly executed Form 952 consent to extend the statute of limitations for assessment of 8702.[5]

This Form 952 extended the time for assessment of the [redacted] year until four years after the corporate income tax return for [redacted] is due or filed, whichever is later. Hence, by force of the Form 952, the statute of limitations on assessment for the [redacted] year of the [redacted] group will not expire until [redacted] at the earliest. Since [redacted] was unquestionably the common parent of the group for the [redacted] consolidated year, and since it acted to extend the limitation period for assessment by executing the Form 952, it also extended the time within which the entire consolidated tax could be assessed against any of the subsidiary corporations. See Treas. Reg. §§ 1.1502-77(a); 1.1502-6(a).

Since [redacted] is the successor corporation to [redacted]

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[5] This agreement was filed in [redacted] and was duplicated in [redacted], well before [redacted] ultimate termination in the [redacted] merger with [redacted]. Consequently, there are no material issues surrounding the corporation's ability to act with respect to this consent.

as discussed previously, [redacted] also succeeds to the "primary" liability of [redacted] for the [redacted] year. Thus, [redacted] can be assessed for the [redacted] income taxes until [redacted] just as [redacted] could have been assessed had [redacted] not gone out of existence by way of the merger.

As to [redacted], this assessment period can be further extended past the deadline established by the Form 952 by the execution of a Form 872 by [redacted] in its status as the successor of [redacted]. While subsequent further extensions of the statute of limitations on assessment are not specifically discussed under Treas. Reg. § 1.332-4, there is no apparent reason for treating the Form 952 agreement as somehow precluding any additional statute extensions under section 6501(c)(4).

Notwithstanding [redacted]'s succession to the income tax liability of [redacted], it does not succeed to [redacted]'s role as the common parent agent for the group under the consolidated return regulations because [redacted] went out of existence when it was merged into [redacted]. See Treas. Reg. § 1.1502-77(d). Thus, to extend the assessment period beyond [redacted] (when the Form 952 lapses) as to each of the subsidiary members of the group that is sought to be bound for the [redacted] year, it will be necessary to secure a Form 872 directly from each of those subsidiary members still in existence.[6]

Taxable Years: [redacted] and [redacted]

According to your request, [redacted] (EIN [redacted]; formerly [redacted]) was the common parent for the [redacted] and [redacted] consolidated tax return filings. An audit of these two years has not yet commenced. We are still within the original three-year post-return periods for assessment on these taxable years, the earliest of which will expire in [redacted] and the latest of which will expire in [redacted]. You state that no action has been taken as yet with regard to extensions of the statute of limitations on assessment for these years.

Assuming no further changes in the corporate structure of the group, statute of limitations extensions for these two years, if desired, should be obtained in accordance with the principles outlined previously for the earlier taxable years. Since the

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[6] If any of these [redacted] group subsidiary corporations have merged out of existence or transferred assets to another, those successors or transferees of the subsidiaries can be reached on the same principles discussed in our earlier memorandum (at pp. 5-6).

common parent for the group for these years, [redacted] (formerly [redacted]), has gone out of existence by way of its [redacted] merger with and into [redacted], we remind you that no corporation is now authorized to act as the agent for the subsidiary members of the group for these later years as well. See generally Treas. Reg. § 1.1502-77(d). Hence, any extension as to the primary liability of the subsidiary members under Treas. Reg. § 1.1502-6(a) must be executed individually by each of those subsidiary corporations. While [redacted] (new [redacted]) can extend the time for assessment of its liability (as the successor to [redacted]/[redacted]) in its own name,[7] nevertheless, it is without power to act as the agent for the entire consolidated group for these purposes.

In addition to being held liable as a successor to [redacted]/[redacted], [redacted] could also be liable as a transferee for these last two years. Therefore, we would recommend that you secure a Form 2045 transferee agreement from [redacted] acknowledging this status. Section 6901 "automatically" extends the limitation period for assessment against [redacted] to one year after the expiration of the limitation period for assessment against [redacted], the transferor. Of course, this period could later be extended as well by the execution of a Form 977.

[redacted]: [redacted] and [redacted]

As stated in your supplemental request for advice, dated [redacted], [redacted] acquired [redacted] and Affiliated Companies on [redacted]. For taxable years after this acquisition, [redacted] and its subsidiaries were included in the consolidated income tax return filings of the [redacted] group. [redacted] sold [redacted] in [redacted], after most of the value thereof had been stripped off via dividend distributions prior to the sale. You have sought advice with respect to the two taxable years of the [redacted] group immediately prior to the acquisition by [redacted], i.e., [redacted] and [redacted].

Assuming the [redacted] acquisition of the [redacted] group was not a "reverse" acquisition under the consolidated return regulations,[8] you are correct that [redacted], since it remains in

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[7] Like it did for the [redacted] and [redacted] years, [redacted] stepped into the "primary liability" of [redacted]/[redacted], by operation of Delaware law, for [redacted] and [redacted] as well.

[8] See Treas. Reg. § 1.1502-75(d)(3). You have confirmed this in that the stockholders of the "second corporation" ([redacted]) did not hold more than fifty percent of the stock of the

existence, continues to be the common parent agent for the "old" pre-acquisition years of the [redacted] group. Further, since an unbroken chain of Forms 872 has been executed, the common parent has duly extended the period for assessment against the subsidiary members of the group for those years as well. If you eventually should decide to seek future consents from these subsidiary members on an individual basis, we caution you that the last sentence of Treas. Reg. § 1.1502-77(a) requires that notice of this individual dealing be sent to the common parent (i.e., [redacted]). The notice to [redacted] is still required even if the individual subsidiary has since left the group (or a succeeding group) entirely. No such notice is required if you continue to deal with [redacted] as the agent of the group since its consent serves to extend the limitation period for all members of the old group.

If the subsidiaries have merged out of existence or transferred their assets by way of a dissolution or otherwise, then "primary" liability as a successor and/or transferee may be available as to these other corporations that received the assets of the former [redacted] subsidiaries. That possibility should be explored as further protection for the Government as to these tax years.

CONCLUSION AND RECOMMENDATION

The liability of [redacted] (now renamed [redacted]) for the taxable years [redacted] and [redacted] of [redacted] is one of transferee liability (as an initial transferee) by virtue of [redacted]'s status as a successor to [redacted] under the Delaware statute and transferee liability as a transferee of a transferee by way of contractual agreement. [redacted] will be bound by its consents further extending the period of that initial transferee liability in the same manner as [redacted] would have been bound. Because the original limitation periods for assessment against the transferor were never extended for these years, and have since expired, only an assessment against the transferee is now available with respect to these taxable years. We recommend, therefore, that Forms 977 be executed for these years by "new" [redacted] ([redacted]) as the successor of [redacted] with respect to [redacted] capacity as transferee of [redacted] (formerly [redacted]).

As to whether a jeopardy assessment against [redacted] at this time and on these facts would be appropriate, we are awaiting the

acquiring or "first corporation" ([redacted]) immediately after the acquisition.

advice of the General Litigation Division.

With regard to the [redacted] taxable year, as a result of the filing of the Form 952 extension, assessment may be made against [redacted] (new [redacted]), as the successor to [redacted], or against any of the other member corporations of the group for that taxable year until [redacted] (which is four years after the filing of the [redacted] return). Any further extension of the assessment period beyond [redacted] as to the subsidiary members of the group for [redacted], however, will have to be executed by each of those members individually, since their common parent has gone out of existence (by way of merger). [redacted] would not have authority to bind those other members. We recommend, therefore, that Forms 872 be obtained from each of those subsidiaries (or at least the largest thereof in terms of assets) as the audit of the [redacted] year progresses and [redacted] approaches.

With regard to [redacted] and [redacted], on the basis of the current corporate structure and since the common parent for the group for these years, [redacted] (formerly [redacted]), has gone out of existence by way of its [redacted] merger with and into [redacted], any extension as to the primary liability of the subsidiary members under Treas. Reg. § 1.1502-6(a) must be executed individually by each of those subsidiary corporations. While [redacted] (new [redacted]) can extend the time for assessment of its liability (as the successor to [redacted]/[redacted]) in its own name, it is without power to act as the agent for the pertinent consolidated return group. Since [redacted] could also be a considered a transferee for these last two years as well, we would recommend that you secure a Form 2045 transferee agreement frcm [redacted] acknowledging this status.

As to your supplemental request on the [redacted] years prior to its acquisition and disposition by [redacted] ([redacted] and [redacted]), [redacted] continues to be the common parent agent for its group for those years. As such, it may continue to extend the limitation period for assessment by way of executing Forms 872 and thus also bind the former members of the group. Since dealing with the common parent, [redacted], will bind all other members of that group, it is not necessary to deal with those members individually and we would recommend that you continue to deal with [redacted] as their proper agent. If the subsidiaries are dealt with individually, however, then [redacted] must be given prior notice to that effect.

Please contact Oreste Russ Pirfo at FTS 566-8665 should you have any questions.

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